

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554**

<b>In the Matter of</b>	§	
	§	
<b>Rules and Regulations Implementing the</b>	§	
<b>Telephone Consumer Protection Act of 1991</b>	§	<b>CG Docket No. 02-278</b>

**COMMENTS OF THE TEXAS  
OFFICE OF PUBLIC UTILITY COUNSEL**

The Office of Public Utility Counsel (OPC) files these comments in response to the *Further Notice of Proposed Rulemaking* (“Further Notice”) adopted by the Federal Communications Commission (“FCC” or “Commission”) on March 24, 2003 in the above-referenced case, stating:

**I.**

OPC is a state agency created to represent consumers as a class on utility issues, including telephone issues.<sup>1</sup> The Commission’s Further Notice was in response to the Do-Not-Call Implementation Act<sup>2</sup> enacted by Congress. This act provided the Federal Trade Commission (“FTC”) with the authority to charge fees for its national database established to allow consumers to stop telemarketing calls to their homes by requesting the FTC to place them on this “Do-Not-Call” (“DNC”) registry. In the Act, Congress directed the FCC to maximize consistency of its currently pending proposed telemarketing rules with the FTC’s telemarketing rules. In addition, once the FCC promulgates these pending rules, Congress directed the FCC to file a report analyzing the newly promulgated rules and to analyze the FTC’s rules relating to telemarketing. Congress also requested the FCC suggest remedies if necessary based upon its analysis.

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<sup>1</sup> Public Utility Regulatory Act (“PURA”), Texas Utility Code Ann. , Sec. 13.002(a)(2), (Vernon Supp. 2003).

The FCC telemarketing proposed rules currently pending, the subject of the Further Notice, seek to amend the FCC's telemarketer rules<sup>3</sup> adopted pursuant to the Telephone Consumer Protection Act of 1991<sup>4</sup>. The act prohibited certain telemarketing activities and exempted certain activities from the prohibited acts.

OPC review of the FTC's and FCC's rules find that inconsistencies exist between them. Some of the inconsistencies can be resolved through the FCC's pending rulemaking. Others would require congressional action. OPC urges the Commission to amend its rules and recommend congressional action that would maximize consumers' protections. Specifically, OPC recommends the Commission to:

- Include all entities within its jurisdiction under its telemarketing rules;
- Adopt the FTC's definition of "established business relationship";
- Recommend that Congress provide businesses protections from telemarketing abuses under the Telephone Consumer Protection Act of 1991;
- Recommend that Congress amend the Telephone Consumer Protection Act of 1991 to limit tax-exempt organizations' activities exempted from the definition of a telephone solicitation under the Act to soliciting for charitable contributions; and
- Recommend that Congress amend the Telephone Consumer Protection Act of 1991 to delete the "established business relationship" exemption for prerecorded or artificial voice telemarketing calls.

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<sup>2</sup> 117 Stat. 557

<sup>3</sup> 47 C.F.R. 64.1200, et.seq.

<sup>4</sup> 105 Stat. 2394

## **II. Recommended Rule Changes**

The proposed rule does not prohibit telemarketing solicitations to consumers who have requested to be placed on the FTC's DNC registry. The FTC does not have jurisdiction over certain institutions and over intrastate activities. For instance, the FTC lacks jurisdiction over common carriers who are under the jurisdiction of the FCC. The Commission should amend its proposed rules to prohibit solicitations to consumers listed in the FTC's DNC registry. This would promote administrative efficiency by having only one national registry.<sup>5</sup> For consumers, the proposed amendment would minimize the steps they have to take to be protected against harassing telemarketing. Minimizing the steps consumers must take better ensures Congress's intent that "banning such automated or prerecorded telephone calls to the home . . . (as) the only effective means of protecting telephone consumers from this nuisance and privacy invasion" would be implemented. Telephone Consumer Protection Act of 1991, 105 Stat. 2394, Sec. 2(12).

Both the FCC and the FTC rules define "established business relationship". The FTC's definition provides greater consumer protections because it establishes reasonable time limits between consumer contact with the vendor and vendor telemarketing. The FTC's rule states, in pertinent part:

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen (18) months immediately preceding the date of a telemarketing call; or

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<sup>5</sup> The FCC has authority to establish a national registry under the Telephone Consumer Protection Act of 1991.

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

The FTC rule places reasonable time limits to ensure consumers will not be harassed by a telemarketer she/he contacted years ago. OPC would urge the FCC to adopt the FTC's definition with one proviso. The Commission's current rule provides a clear bright line to telemarketers that business relationships previously terminated by either party would not be exempted from prohibited solicitation. OPC urges the Commission to retain the phrase "which relationship has not been previously terminated by either party" and to place the phrase at the end of the FTC's rule.

### **III. Recommended Statutory Changes**

While the FTC also allows business consumers to request to be placed on a company-specific DNC list, the FCC does not. OPC believes that the Commission may not have authority to extend this consumer protection to business consumers. *See Telephone Consumer Protection Act of 1991*, Sec.3, (c) (3). 105 Stat. 2394. Businesses are highly dependent upon phone communications to perform their operations. The ability to transact business can be hindered by unwanted telemarketers. Business may be financially harmed by their missing important calls due to unwanted telemarketers. To protect businesses, OPC suggests that the Commission recommend to Congress that businesses be included within the company specific DNC list. OPC would also recommend the Commission consider recommending to Congress that businesses be equally protected from all the telemarketing activities prohibited by Congress.

There is a conflict between the tax-exempt organization exemption in the definition of telephone solicitation of the FCC and the FTC. The FTC rule only exempts requests for

charitable contributions. The FCC rule includes sales of services or products by tax-exempt organizations. This added exempted activity results in many calls unwanted by consumers. Unfortunately, the FCC's charitable exemption is reflective of the Commission's authority. OPC urges the Commission to recommend to Congress that the charitable exemption be limited to solicitation of charitable contributions only. This suggestion would protect consumers against unwanted sales of goods or services while at the same time would allow charities to seek contributions. OPC's recommendation strikes a reasonable balance between consumers seeking privacy and charities seeking contributions.

OPC urges the Commission to eliminate the "established business relationship" exemption from its prohibition on calls using an artificial or prerecorded voice to residential customers. *See* 47 C.F.R. Secs 64.1200(a)(2); 64.1200(c). The Commission may not have the authority under the Telephone Consumer Protection Act of 1991 to eliminate the exemption. OPC urges the Commission to determine whether it has jurisdiction and if so to eliminate this exemption. If the Commission determines it does not have this authority, the OPC urges the Commission to recommend to Congress that it be given this authority. Consumers should not be subjected to prerecorded messages on a variety of products or services simply because s/he inquired about one product or service. Telemarketers would still be able to make live follow-up calls.

#### **IV. Record Keeping**

The FTC has placed no time limit on companies retaining their company-specific DNC lists. The FCC has set a time limit of ten years. OPC urges the Commission to retain its ten year retention period. The FTC rules create ambiguity and lack bright line guidelines for the

telemarketing industry. The FCC's time limit does provide clear guidelines to provide efficient administration.

**V.**

OPC reserves the right to provide additional recommendations in response to other commentators to the Further Notice.

Dated:  
May 5, 2003

Respectfully submitted,  
Suzi Ray McClellan  
Public Counsel  
State Bar No. 16607620

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LANETTA COOPER  
Assistant Public Counsel  
State Bar No. 04780660

1701 N. Congress Avenue, Suite 9-180  
P.O. Box 12397  
Austin, Texas 78711-2397  
512/936-7500  
512/936-7520 (Facsimile)

ATTORNEYS FOR THE  
OFFICE OF PUBLIC UTILITY COUNSEL